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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RANDY MATTHEW CORDERO, Defendant and Appellant.	E030832 (Super.Ct.No. HEF 004261) O P I N I O N

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Anthony Da Silva and Erika Hiramatsu, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant of domestic violence with traumatic condition (Pen. Code, § 273.5, subd. (a)) (count 1), assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) (count 2), criminal threats (Pen. Code, § 422) (count 3), and misdemeanor child endangerment (Pen. Code, § 273a, subd. (b)) (count 4). Defendant's former girlfriend, Gelin Juarez (Juarez), was the victim in counts 1, 2, and 3, and defendant and Juarez's one-year-old daughter, Abie, was the victim in count 4. The trial court found that defendant had one prior strike conviction (Pen. Code, §§ 667, subds. (c) & (e) & 1170.12, subd. (c)), and sentenced defendant to an aggregate term of eight years.

Defendant appeals. First, he contends he was deprived of his right to present a defense, because the trial court erroneously refused to allow him to introduce evidence of Juarez's prior acts of domestic violence against him. Second, he contends the trial court erroneously admitted Juarez's out-of-court statements as spontaneous declarations under Evidence Code section 1240.[1] Third, he contends the trial court erroneously admitted evidence of his prior acts of domestic violence against three other women under sections 1101, subdivision (b), and 1109. Fourth, defendant contends that all of his convictions must be reversed, because the trial court's cumulative errors denied him a fair trial and

[1] All further statutory references will be to the Evidence Code unless otherwise noted.

the right to confront witnesses. Fifth, sixth, and seventh, he contends there is insufficient evidence to support his convictions in counts 2, 3, and 4.

We conclude that the evidence of Juarez's prior acts of domestic violence against defendant was admissible for the sole purpose of impeaching Juarez's credibility. But the exclusion of the evidence did not deprive defendant of his right to present a defense, and was harmless. We find defendant's remaining contentions without merit, and affirm.

FACTS AND PROCEDURAL HISTORY

A. *Prosecution*

On January 12, 2001, at approximately 12:30 p.m., Juarez called 911 and reported that defendant, her ex-boyfriend, had just come to her home and had hit her and their baby daughter, Abie, in the head.[2] She said that defendant was just leaving, she had a restraining order against him, and he was threatening her.

About five minutes after the 911 call, Officer Curtiss (Curtiss) arrived at Juarez's home.[3] Upon his arrival, he spoke with Juarez for 10 to 15 minutes in the living room of the home. Juarez did not testify at trial.[4] Curtiss testified about what Juarez told him and what he observed.

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[2] Abie was about one year old at the time of the incident.

[3] Juarez and Abie lived in a mobile home with defendant's mother and Lena Davis. Defendant lived in a mobile home next door with John Gibbons (Gibbons) and Nidia Ochoa (Ochoa).

[footnote continued on next page]

Juarez was visibly upset, shaking, and crying, and remained upset throughout the interview. She spoke in a narrative, and Curtiss clarified certain points by asking specific questions. She was holding Abie in her arm. Two other women were also present. Another officer, who arrived before Curtiss, was speaking to Juarez when Curtiss arrived.

Curtiss saw that Juarez had a red mark on her right cheek, and red marks on both sides of her neck. She told Curtiss that she received the mark on her face when defendant slapped her, and received the marks on her neck when defendant choked her. Juarez declined medical treatment. Curtiss did not see any marks on Abie, and Abie did not require medical attention.

Juarez told Curtiss that minutes before she called 911, she and defendant were arguing in the carport area at the rear of the home. Juarez took Abie and walked into the home through the back door. Defendant got into his pickup truck, accelerated at a high rate of speed, and went around to the front of the home.[5] From inside the home, Juarez heard defendant yelling at her. She went to the front door, holding Abie in her right arm. Juarez and defendant continued arguing for a few minutes, while defendant was still in his pickup truck. Defendant then got out of his truck and walked up to the front door, "yelling and cussing" at Juarez.

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[4] At the time of trial, Juarez was pregnant with defendant's second child and was due to give birth any day. Juarez and Abie moved to Detroit about three months before trial, and were living with Juarez's mother.

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Defendant grabbed Juarez around the throat and choked her. As he did so, he said, "I feel like killing you. I feel like putting a bullet through your head." Juarez was scared, and believed defendant was going to harm her. She told Curtiss that on a previous occasion, defendant told her he was carrying a gun under the front seat of his truck. Defendant then slapped Juarez across the right side of her face with his open left hand. As he did so, he also hit Abie, and knocked Juarez off balance, nearly causing her to fall.

Juarez went into a bedroom to call 911, and defendant followed her. He left during the 911 call. He was apprehended about 30 minutes later at a local convenience store. He consented to a search of his truck, and no gun was found.

Jodi Grabowsky (Grabowsky) lived in a mobile home park behind Juarez and defendant. Grabowsky testified that she was walking nearby at the time of the incident. She said she heard tires screeching and saw defendant approach Juarez in the front doorway of Juarez's home. She also said they were arguing and that Juarez was holding Abie. She further testified, however, that she did not see defendant strike, slap, or choke Juarez or the baby.

About three months after the incident, on April 17, 2001, Grabowsky told the district attorney's investigator, Richard Bitonti (Bitonti), that she saw defendant slap Juarez and hit Abie in the process. At trial, Grabowsky explained that she had lied to Bitonti because she was mad at defendant.

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5 Curtiss saw skid marks on the pavement where Juarez said defendant accelerated his truck.

Bitonti tape-recorded his April 17, 2001, interview with Grabowsky. The tape was played for the jury. On the tape, Grabowsky stated that defendant slapped Juarez with his left hand while Juarez was holding the baby. She also said that "the baby's head went back, and he hit the baby too."

About a month after the incident, on February 14, 2001, Grabowsky also told a defense investigator, Wayne Wealer (Wealer), that she saw defendant slap Juarez. But on July 27, 2001, about five days before Grabowsky testified, she told Wealer that she did not see defendant strike, slap, or choke Juarez or the baby.

B. *Defendant's Prior Acts of Domestic Violence*

The prosecution presented evidence that defendant committed acts of domestic violence against three women during 1997 and 1998, after the women ended their dating relationships with defendant. The women, Casandra Fernandez (Fernandez), Sarah Briggs (Briggs), and Sarah Ellis (Ellis), testified to the following facts.

1. Fernandez

Fernandez met defendant in 1997. They exchanged telephone numbers, and went on one date. Thereafter, defendant called and paged Fernandez numerous times. She finally called him back and asked him not to call her again. He became angry and defensive and used profanity. He told Fernandez she was "messing with his feelings and his mind." He also told her that he was going to come to her house with a gun, kill her family, make her watch, then shoot her in the head. Fernandez was scared and upset, and

hung up on defendant. She told her mother what defendant said, and reported the incident to the police.

2. Briggs

Briggs met defendant in 1997, when she was 16 years old and defendant was 21. After dating for a few weeks, Briggs became defendant's girlfriend. After about 10 months she broke up with defendant. After the breakup, on August 17, 1998, defendant contacted Briggs. After a while, Briggs agreed to meet defendant at his friend's house. Briggs brought some of defendant's things with her to the house.

When Briggs arrived at the house, she did not get out of her car. Briggs tried to leave, and defendant tried to stop her by putting his upper body inside her car, through the driver's side window, and holding her wrists. After several minutes of telling defendant to get out, Briggs started the car rolling, and defendant hit her hard in the face with his left hand. Briggs drove away and became hysterical. She called her mother and went to the police station. She did not require medical attention.

3. Ellis

Ellis met defendant in October 1998. They dated for three and a half weeks until Ellis ended the relationship. In November 1998, before the breakup, Ellis and defendant were arguing in an apartment. Defendant was "angry . . . cussing and calling [Ellis] names." When Ellis tried to leave, defendant blocked the door and prevented her from leaving. Eventually Ellis was able to leave and got in her car. Defendant grabbed Ellis's

wrists and pulled her out of her car through the open driver's side door. Ellis got away and called the police.

C. *Defense*

Curtiss did not take photographs of Juarez on the day of the incident. He said he did not have a camera available to him, and that the digital cameras they used sometimes did not pick up red marks. Sergeant Simmons detained defendant about 30 minutes after the incident. He obtained defendant's consent to search his truck. As noted above, no gun was found.

On the date of the incident, defendant lived in a mobile home with Gibbons and Ochoa, next door to Juarez, defendant's mother, and Lena Davis. Defendant and Gibbons were friends. Before the incident, they had known each other for two years, and had lived together for six months. On the morning of the incident, Gibbons and defendant were laid off from their jobs. They went to get a job application for defendant. When they returned, Gibbons witnessed the entire argument between Juarez and defendant.

Gibbons testified that Juarez "came out in her nightclothes[,] with the baby in her nightclothes and she proceeded to pretty much harass [defendant] and provoke him in any way that she could. [¶] . . . [¶] She was yelling, screaming, she spit on him." He said that Juarez went up to defendant's truck and "socked him" while he was sitting in the truck. He said defendant tried to leave in his truck, but Juarez "jumped out in front of the truck" with the baby. Defendant stopped, and made the skid marks in the driveway.

Gibbons said that throughout the argument, defendant did not hit, slap, or choke Juarez, and that defendant "never put his hands on [Juarez]."

Ochoa also witnessed the argument between defendant and Juarez. She said defendant and Juarez were "both yelling back and forth," but said defendant did not "grab [Juarez's] neck" or slap her. Lena Davis was not home at the time of the incident, but came home when police officers were present. She said the officers had a camera inside the mobile home, but did not take it out of the case, and did not take any photographs of Juarez.

A family law court order dated January 19, 2000, was admitted into evidence. It ordered that Abie would not be removed from Los Angeles or Riverside Counties for the purpose of changing residences. The trial court also admitted a temporary restraining order that Juarez had obtained against defendant.

D. *Rebuttal*

When Sergeant Simmons detained defendant, he did not see any injuries on him, nor did he see any marks on his face. Defendant did not complain of any pain. Defense investigator Wealer interviewed Gibbons on February 14, 2001. Gibbons said defendant called him twice on the afternoon of January 12. During the first call, defendant asked whether police officers were present at his home.

DISCUSSION

A. *The Trial Court Erred in Refusing To Admit Evidence of Juarez's Prior Acts of Domestic Violence Against Defendant to Impeach Juarez's Credibility, But the Error Was Harmless*

Before trial, defendant sought to introduce evidence that, about three days before January 12, Juarez spat on and pushed defendant, and "pounded" him several times on the back with a closed fist. During trial, defendant sought to introduce evidence that on separate occasions in 1999, Juarez stabbed defendant with a pork chop bone and attacked him with a baseball bat. Defendant argued that the evidence was admissible (1) to impeach Juarez's credibility, (2) to show that defendant acted in self-defense, and (3) to show Juarez's character or propensity for violence.

The trial court refused to admit the evidence. It reasoned that "[y]ou can have self-defense as to something occurring that day, but something happening a couple [of] days previously, something [that] happened a year or two years previously, the Court finds it really difficult to believe that a person's going to go out and strike another person because of something that happened on a prior date." The trial court did not discuss why the evidence was not admissible (1) to impeach Juarez's credibility, or (2) to show that Juarez had a propensity for violence, but defense counsel did not explain why the evidence was admissible on these grounds.

Defendant contends that the evidence was admissible to impeach Juarez's credibility and to show that he struck her in self-defense. He relies on sections 780,

subdivision (f), 1103, subdivision (a), and 1202. He argues that the exclusion of the evidence deprived him of the right to present a defense. He further contends that, if this court finds he waived the admission of the evidence because his counsel did not fully explain the reasons for its admissibility, his counsel rendered ineffective assistance.

We need not reach defendant's ineffective assistance claim. As we shall explain, the evidence was admissible solely on the issue of Juarez's credibility. But the exclusion of the evidence on this issue did not deprive defendant of his right to present a defense, and was harmless. Further, the evidence was not admissible on the issue of self-defense, because there was no evidence that defendant struck Juarez in self-defense. Nor was the evidence admissible to show that Juarez had a propensity for violence, because that was not a disputed issue of consequence to the action.

1. Juarez's Credibility

Evidence that a witness had some motive, bias, or interest that might induce false testimony is generally admissible to attack the witness's credibility. (§ 780, subd. (f);[6] *People v. Mickle* (1991) 54 Cal.3d 140, 168.) Such evidence may include specific acts and conduct of the witness. (*People v. Johnson* (1984) 159 Cal.App.3d 163, 168.)

The evidence of Juarez's prior acts of domestic violence against defendant had some tendency to show that she was angry with defendant, and therefore had reason to

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[6] Section 780 provides, in pertinent part, that "[e]xcept as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his

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fabricate or embellish her statements to the 911 dispatcher and to Curtiss. Thus, the evidence was admissible to impeach Juarez's credibility, under section 780, subdivision (f).[7] Nevertheless, its exclusion did not deprive defendant of the right to present a defense, and was harmless.

"As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.]" (*People v Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Although the complete exclusion of evidence of an accused's defense could rise to this level, the rejection of only some evidence concerning the defense is an error of law only. (*Ibid*.) We review these errors under the standard of review announced in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Fudge, supra,* at p. 1103.)

Defendant's defense was that he did not strike or otherwise assault Juarez. The exclusion of the evidence of Juarez's prior acts of domestic violence against defendant did not prevent defendant from presenting this defense. Defense counsel called witnesses Gibbons and Ochoa, each of whom testified that the defendant did not strike Juarez.

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testimony at the hearing, including but not limited to any of the following: [¶] . . . [¶] (f) The existence or nonexistence of bias, interest, or other motive."

[7] Defendant further argues that the evidence of defendant's prior acts of domestic violence was admissible under section 1202, for the purpose of impeaching Juarez. We disagree. Section 1202 provides that evidence of a hearsay declarant's statement or conduct that is *inconsistent* with his or her statements received as hearsay evidence is admissible to impeach the declarant's credibility. (§ 1202.) Juarez's prior acts of domestic violence against defendant were not inconsistent with her statements to the 911 dispatcher and Curtiss.

Curtiss was also cross-examined on his failure to take photographs of Juarez's face and neck. And witness Davis testified that Curtiss had a camera when he was interviewing Juarez, but did not take the camera out of the case.

Additionally, Juarez's statements to the 911 dispatcher and Curtiss, that defendant choked and slapped her and also struck Abie, were corroborated by other evidence. Curtiss observed red marks on Juarez's face and neck, and Grabowsky told the district attorney's and defense's investigators that she saw defendant strike Juarez and Abie.

The jury also heard, through Gibbons's testimony, that Juarez spat on and struck defendant during the argument on January 12. Thus, the jury was able to consider Juarez's propensity for violence toward defendant in assessing her credibility in accusing him of the alleged crimes.

Accordingly, it is not reasonably probable that the exclusion of the evidence of Juarez's prior acts of domestic violence against defendant affected the jury's verdicts.

2. Self-Defense

The defense of self-defense requires an actual and reasonable belief in the need to defend against *imminent* harm. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Here, there was no evidence that defendant struck Juarez in self-defense. Rather, the evidence showed that he got out of his truck, approached Juarez in the doorway of the mobile home, and choked and slapped her as she held their one-year-old child, Abie.

Defendant presented no evidence that he struck Juarez in self-defense. Rather, his defense was that he *did not* choke or strike Juarez. Gibbons testified for the defense that

Juarez spat on and struck defendant, and denied that defendant struck Juarez. Ochoa also testified for the defense that defendant did not strike Juarez. Based on the evidence, Juarez's prior acts of domestic violence against defendant had no bearing on whether defendant struck Juarez in self-defense.

3. Juarez's Propensity for Violence

Defendant argues that the evidence of Juarez's prior acts of domestic violence was admissible to show she had a propensity to commit acts of domestic violence against him. We disagree that the evidence was admissible on any issue other than Juarez's credibility.

Section 1103, subdivision (a), provides that in a criminal trial, evidence of the victim's character, the form of specific instances of conduct, is not inadmissible under section 1101, subdivision (a), if it is offered by the defendant to show that the victim acted in conformity with that conduct. But evidence is admissible only if it is relevant, that is, only if it has a tendency in reason to prove or disprove a disputed fact of consequence to the action. (§ 210.)

The evidence of Juarez's prior acts of domestic violence was not admissible merely to show she had a propensity for violence. That was not an issue of consequence to the action. Thus, there was no error in failing to admit the evidence on this ground.

B. *Juarez's Hearsay Statements to Curtiss Were Properly Admitted as Spontaneous Declarations under Section 1240*

Defendant contends that the trial court erred in admitting Juarez's hearsay statements to Curtiss, because they were not spontaneous declarations under section

1240.[8] He argues that some of the statements were in response to questions, some were made after Juarez calmed down, and Juarez had time to contrive and misrepresent her statements before she made them. He further argues that Juarez's statement that, on a prior occasion, defendant told her he was carrying a gun under the front seat of his truck, was not a spontaneous declaration.

"Hearsay, of course, is evidence of an out-of-court statement offered by its proponent to prove what it states. (Evid. Code, § 1200, subd. (a).) Unless it comes within an exception, it is inadmissible. (*Id*., § 1200, subd. (b).) One such exception is for spontaneous declarations . . . ." (*People v. Alvarez* (1996) 14 Cal.4th 155, 185.)

"'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been [made] before there has been time to contrive and misrepresent . . .; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

"The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . the mental state of the speaker. The nature of the utterance—how long it was made after the startling incident

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[8] Section 1240 provides that "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

and whether the speaker blurted it out, for example—may be important, but solely as an indictor of the mental state of the declarant. The fact that a statement is made in response to questioning is one factor suggesting the answer may be the product of deliberation, but it does not ipso facto deprive the statement of spontaneity. Thus, an answer to a simple inquiry has been held to be spontaneous. [Citations.] More detailed questioning, in contrast, is likely to deprive the response of the requisite spontaneity. [Citations.] But ultimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter. [Citation.]" (*People v. Farmer* (1989) 47 Cal.3d 888, 903-904, overruled on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; accord, *People v. Roybal* (1998) 19 Cal.4th 481, 516.)

"Whether a statement satisfies the requirements of the spontaneous declaration exception is 'largely a question of fact' and is within the discretion of the trial court. [Citation.]" (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234.) We uphold the trial court's determination of this factual question if it is supported by substantial evidence. We review for abuse of discretion the ultimate decision whether to admit the evidence. (*People v. Phillips* (2000) 22 Cal.4th 226, 235-236.)

Juarez called 911 at 12:30 p.m. and Curtiss arrived about five minutes later. Juarez was visibly upset, shaking, and crying. She was holding Abie, and speaking to another officer who had arrived before Curtiss. Two other women were also present. Curtiss spoke to Juarez for 10 to 15 minutes. Curtiss said that Juarez calmed down

toward the end of the interview, but remained upset throughout the interview. Juarez spoke in a narrative, and Curtiss clarified certain points by asking specific questions.

Juarez told Curtiss that defendant approached her in the doorway of the home, and choked her as she was holding Abie. As he did so, he said, "I feel like killing you. I feel like putting a bullet through your head." Juarez said defendant then slapped her in the face and hit Abie in the process. Juarez said she was scared, and believed defendant was going to harm her. She said that, on a previous occasion, defendant told her he was carrying a gun under the front seat of his truck.

After hearing testimony from Curtiss at a section 402 hearing, the trial court found that "the statements were made under the stress of excitement and while reflective powers were still in abeyance." The trial court also found that the events Juarez reported to Curtiss were "startling enough to produce the nervous excitement" she exhibited, "which thereby rendered the utterance spontaneous and unreflecting."

In our view, there was ample evidence to support the trial court's determination that Juarez had recently observed a startling event and was still under the stress and excitement of that event throughout her interview with Curtiss. All of Juarez's statements to Curtiss were hearsay, and were spontaneous declarations because they purported to "narrate, describe, or explain" events that Juarez perceived personally. (§ 1240, subd. (a).)

Defendant argues that Juarez's statements to the 911 dispatcher were inconsistent with her statements to Curtiss,[9] and that the inconsistencies show that Juarez had "ample opportunity to reflect and fabricate portions of her statements to Curtiss." We disagree. The inconsistencies between the 911 tape and Juarez's statements to Curtiss are de minimis. They do not indicate that Juarez fabricated her statements to Curtiss.

Defendant further argues that the statement about the gun in the truck was not a spontaneous declaration, because it did not "narrate, describe, or explain an act, condition, or event" that Juarez perceived personally. (*People v. Phillips, supra,* 22 Cal.4th at p. 235.) We disagree. The statement *helped explain* the acts and events that Juarez had just perceived, specifically, defendant's assault upon Juarez and his threat to shoot Juarez. (*People v. Farmer, supra,* 47 Cal.3d at pp. 904-905.)

Additionally, defendant's underlying statement to Juarez was also not hearsay, because it was not offered to prove its truth. (§ 1200.) Instead, it was offered to show that Juarez had a "sustained fear" for purposes of the criminal threats charge (Pen. Code, § 422), and was properly admitted for that purpose.

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[9] Defendant stresses that Juarez told the 911 dispatcher that defendant "just hit me and the baby," and "put his hand around my neck and . . . was gonna choke me." She told Curtiss, however, that defendant actually choked her. He also points out that Juarez did not tell the 911 dispatcher that defendant said he felt like killing her and putting a bullet through her head, although she relayed that statement to Curtiss.

C. *The Evidence of Defendant's Prior Acts of Domestic Violence Against Fernandez, Briggs, and Ellis Was Properly Admitted Under Sections 1109 and 1101, Subdivision (b)*

Defendant contends that the trial court erred in admitting evidence of his prior acts of domestic violence under sections 1109 and 1101, subdivision (b). As described above, the evidence consisted of testimony from three women, namely, Fernandez, Briggs, and Ellis, whom defendant dated during 1997 and 1998.

Defendant argues that the evidence was dissimilar to the charged offenses, and that the prejudicial impact of the prior acts evidence outweighed its probative value under section 352. We conclude that the evidence was properly admitted under sections 1109 and 1101, subdivision (b).

1. Section 1109

Under section 1109, a defendant's prior acts of domestic violence are admissible to show that the defendant had a propensity to commit one or more charged offenses involving domestic violence, unless the evidence is inadmissible under section 352.[10] (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.) For purposes of section 1109, the

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[10] Section 1109, subdivision (a)(1), provides, in pertinent part, that "[e]xcept as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." Section 1109, subdivision (e), provides that "[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." Section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the

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term "domestic violence" means "abuse committed against . . . [a] person with whom the suspect . . . is having or has had a dating . . . relationship." (§ 1109, subd. (d); Pen. Code, § 13700, subd. (b).) The term "abuse" means "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (Pen. Code, § 13700, subd. (a).)

Before admitting evidence under section 1109, the trial court must "engage in a careful weighing process under section 352." (See *People v. Falsetta* (1999) 21 Cal.4th 903, 916-917 [applying section 352 to propensity evidence admitted under section 1108].) The trial court must consider such factors as the "nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the [propensity evidence], or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta, supra,* at p. 917.)

"The 'prejudice' referred to in [section 352] applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has

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probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' [Citation.]" (*People v. Poplar, supra,* 70 Cal.App.4th at p. 1138, citing *People v. Karis* (1988) 46 Cal.3d 612, 638.) "The admissibility of evidence of domestic violence is subject to the sound discretion of the trial court, which will not be disturbed on appeal absent a showing of an abuse of discretion." (*People v. Poplar, supra,* at p. 1138.)

In the present case, Fernandez, Briggs, and Ellis each testified that defendant became angry and abusive after they stopped dating him. Defendant threatened to kill Fernandez's family, make her watch, and shoot her in the head. He struck Briggs in the face when she tried to leave in her car, and he tried to pull Ellis out of her car when she tried to leave.

After the prosecution rested its case, the trial court instructed the jury that it could consider the prior acts evidence in determining whether defendant had a disposition to commit the crimes charged in counts 1 and 2, namely, domestic violence with traumatic condition (Pen. Code, § 273.5, subd. (a)) and assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)). It later gave the jury a modified version of CALJIC No. 2.50.02.

The trial court did not abuse its discretion in admitting the prior acts evidence for the purpose of showing defendant's disposition to commit the crimes charged in counts 1 and 2. The prior acts occurred during 1997 and 1998, within five years of the January 12, 2001, incident involving Juarez, and were strikingly similar to the incident involving

Juarez. In each case, defendant used and/or threatened to use physical violence against his former girlfriends. Additionally, the evidence of the prior acts was not likely to distract the jurors from the charged offenses involving Juarez, and no inflammatory details of the prior acts were admitted.

Defendant notes that our state Supreme Court has not yet determined whether the admission of a defendant's prior acts of domestic violence under section 1109 violates a defendant's due process rights. This court has, however, held that section 1109 does not offend due process. (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1025-1029.) Other appellate courts have reached the same conclusion. (E.g., *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096; *People v. James* (2000) 81 Cal.App.4th 1343, 1353; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1310; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1331-1334; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-419.)

These decisions are based on the reasoning of *People v. Falsetta, supra,* 21 Cal.4th at p. 917. There, the high court held that section 1108, which permits evidence of a defendant's uncharged sex offenses to show his propensity to commit offenses of the same type, did not violate due process. The *Falsetta* court reasoned that the trial court's discretion to exclude unduly prejudicial evidence under section 352 saved section 1108 from the defendant's due process challenge. (*People v. Falsetta, supra,* at p. 917.) For the same reason, section 1109 does not offend due process.

2. Section 1101, Subdivision (b)

After the prosecution rested its case, the trial court also instructed the jury that it could consider the prior acts evidence in determining whether defendant had a common scheme or plan, or lack of mistake or accident, in committing the crimes charged in counts 3 and 4, namely, criminal threats (Pen. Code, § 422), and misdemeanor child endangerment (Pen. Code, § 273a, subd. (b)). It later gave the jury a modified version of CALJIC No. 2.50. The instruction also allowed the jury to consider the evidence in determining whether defendant intended to commit the crimes charged in counts 3 and 4.

"Character evidence is inadmissible when offered to prove conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) The purpose of this rule is to avoid placing an accused in the position of defending against crimes for which he [or she] has not been charged and to avoid having a jury convict him [or her] on prejudicial character evidence alone. [Citation.]" (*Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 430; accord, *People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).)

Under section 1101, subdivision (b), evidence that a defendant committed other crimes, civil wrongs, or other acts is not inadmissible under section 1101 if it is relevant to prove a fact (e.g., intent, absence of mistake or accident, or common plan or design), other than the defendant's disposition to commit the charged crime. (*Ewoldt, supra,* 7 Cal.4th at p. 393.)

The admissibility of such evidence "depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the

uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence." (*People v. Thompson* (1980) 27 Cal.3d 303, 315, disapproved on another ground in *People v. Williams* (1988) 44 Cal.3d 883, 907, fn. 7.)

In determining whether evidence of other crimes has a *tendency* to prove a material fact in dispute, the court must first determine whether or not the uncharged offense serves "'"logically, naturally, and by reasonable inference"' to establish that fact." (*People v. Thompson, supra,* 27 Cal.3d at p. 316.) Moreover, "[e]vidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' [Citations.] 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have *substantial* probative value.' [Citation.]" (*Ewoldt, supra,* 7 Cal.4th at p. 404.)

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*Ewoldt, supra,* 7 Cal.4th at p. 402.)

Additionally, "'[e]vidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, "[i]n proving design, the act is still undetermined . . . ." [Citation.]' [Citation.] To establish a common design or plan, the evidence must demonstrate not merely a similarity in the results, but '"such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." [Citation.]' [Citation.]" (*People v. Balcom* (1994) 7 Cal.4th 414, 423-424, citing *Ewoldt, supra,* 7 Cal.4th at pp. 393-394 and fn. 2.)

Even where evidence is not required to be excluded under section 1101, a further inquiry under section 352 is required. (*People v. Balcom, supra,* 7 Cal.4th at pp. 426-427.) The trial court's evaluation of the evidence under section 352 is reviewed for an abuse of discretion. (*People v. Daniels* (1991) 52 Cal.3d 815, 858.)

The trial court did not abuse its discretion in admitting the prior acts evidence on counts 3 and 4, for the purposes of showing that defendant had a common plan or scheme, lack of mistake or accident, and intent to commit the charged offenses. The prior acts were strikingly similar to the charged offenses in counts 3 and 4, because each involved the use or threatened use of physical violence.

More specifically, the prior acts evidence showed that defendant threatened to shoot Fernandez in the head. In count 3, he allegedly threatened to shoot Juarez in the head. In count 4, defendant allegedly inflicted unjustifiable physical pain or mental

suffering on Abie, or permitted Abie to be placed in a situation where her person or health was endangered. The prior acts evidence showed that he did the same to Ellis and Briggs.

D. *There Was No Cumulative Error*

Defendant contends that his convictions must be reversed because the trial court's cumulative errors in excluding and admitting evidence deprived him of a fair trial. We disagree. As we explained above, the trial court erred only in refusing to admit evidence of Juarez's prior acts of domestic violence against defendant on the issue of her credibility. And as we further explained, that error was harmless.

E. *Substantial Evidence Supports Defendant's Conviction for Making Criminal Threats*

Defendant contends that there is insufficient evidence to support his conviction for making criminal threats in count 3. (Pen. Code, § 422.) We disagree.

"In reviewing a criminal conviction challenged as lacking evidentiary support, '"the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

Section 422 provides, in pertinent part, that "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent

of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

"In order to establish a section 422 violation, the prosecution must establish (1) that the defendant had the specific intent that his statement would be taken as a threat (whether or not he actually intended to carry the threat out), and (2) that the victim was in a state of 'sustained fear.' The prosecution must additionally show that the nature of the threat, both on 'its face and under the circumstances in which it is made,' was such as to convey to the victim an immediate prospect of execution of the threat and to render the victim's fear reasonable." (*People v. Garrett* (1994) 30 Cal.App.4th 962, 966-967.)

In the present case, the evidence showed that defendant choked Juarez, and as he did so, said, "I feel like killing you. I feel like putting a bullet through your head." Defendant argues that this statement did not convey the immediate prospect of execution of the threat, but only conveyed what he "felt like." He also argues that the threat did not cause Juarez to be in a state of "sustained fear." We disagree. We find substantial evidence of both elements.

In determining whether a threat is "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution . . ." we consider the words of the threat and the circumstances under which it was made. (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157-1158, italics omitted.) The parties' history can be considered as one of the relevant circumstances. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.) A threat is sufficiently specific if it threatens death or great bodily injury. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1432.) A "sustained fear" means a period of time that is more than "momentary, fleeting or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

The words and circumstances of the death threat reasonably conveyed to Juarez the prospect of its immediate execution. Defendant grabbed her neck and choked her, and as he did so, threatened to put a bullet in her head. On a prior occasion, defendant told her he carried a gun under the front seat of his truck. Juarez was shaking and crying after the incident. Thus, her fear was not momentary, but sustained. Therefore, substantial evidence supported defendant's conviction in count 3.

F. *Substantial Evidence Supports Defendant's Conviction for Assault By Means of Force Likely to Produce Great Bodily Injury*

Defendant contends that there was insufficient evidence to support his conviction in count 2 (Pen. Code, § 245, subd. (a)(1)), because there was no evidence that he assaulted Juarez by means of force likely to produce great bodily injury. We disagree.

Section 245, subdivision (a)(1), punished assaults committed by means of force necessary to produce great bodily injury. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) "[T]he statute focuses on *use* of . . . force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial." (*Ibid*.) The use of hands or fists alone may support a conviction for the crime. (*Ibid*.) "Great bodily injury" means a "significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or moderate harm." (CALJIC No. 9.02.)

Here, the evidence showed that defendant choked Juarez in a vital area, her neck. He also slapped her and nearly caused her to fall. At the time, Juarez was pregnant and holding a one-year-old child. If she had fallen, she, Abie and the unborn child may have been seriously injured.

G. *Substantial Evidence Supports Defendant's Conviction for Child Endangerment*

Defendant contends that there is insufficient evidence to support his conviction for child endangerment in count 4 (Pen. Code, § 273a, subd. (b)), because there was no evidence that the child, Abie, suffered physical pain or mental anguish as a result of the incident. We disagree.

Penal Code section 273a, subdivision (b), provides that "[a]ny person who, under circumstances or conditions other than those likely to produce great bodily harm or death, *willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering*, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that

child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor." (Italics added.) The jury was instructed that "[u]njustifiable physical pain or mental suffering is the infliction of pain or suffering which, under the circumstances, is unreasonable either as to necessity or degree." (CALJIC No. 16.170.)

Defendant notes that Curtiss did not observe any marks on Abie, and that the baby did not need medical attention. The evidence showed, however, that defendant slapped Juarez, and in the process struck Abie. Grabowsky said, "the baby's head went back and he hit the baby too." The evidence therefore supports a reasonable inference that the baby suffered unjustifiable physical pain, unjustifiable mental anguish, or both. Accordingly, substantial evidence supports defendant's conviction in count 4.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Ward
Acting P.J.

/s/ Gaut
J.